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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMON CAUSE, ET AL.,
Appellants,
v.
HARRISON SCHMITT, ET AL.,
Appellees.

On Appeal From the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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November 25, 1980

QUESTION PRESENTED

Under the Presidential Election Campaign Fund Act, 26 U.S.C. ch. 95, a candidate for President may opt to finance his campaign through a public grant, instead of through private fundraising. Where a Presidential candidate receives public financing, political committees that solicit and spend contributions but are not part of the candidate's official campaign may not, under Section 9012(f) of the Act, 26 U.S.C. § 9012(f), spend more than $1,000 to further his election. Section 9012(f) does allow individuals and groups of individuals to make unlimited independent expenditures of their own money in those circumstances.

The ultimate question presented is whether the district court erred in holding 26 U.S.C. § 9012(f) unconstitutional under the First Amendment.

The threshold question presented is whether this Court should summarily reverse the decision below and remand the case to the district court with directions to develop a factual record adequate to serve as the basis for constitutional adjudication.*

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* In addition to the parties named in the caption, the other parties to the proceeding below were David Cohen, Winifred Long, Carl T. Curtis, Americans for Change, Americans For An Effective Presidency, Fund For A Conservative Majority, and the Federal Election Commission. The alignment of the parties is set forth at page 2 *infra*.

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JURISDICTIONAL STATEMENT

Appellants Common Cause, David Cohen and Winifred Long (plaintiffs below) appeal from the orders entered by the United States District Court for the District of Columbia on August 28, 1980 and September 30, 1980 that granted summary judgment for appellees (defendants below) and dismissed appellants' action on the ground that 26 U.S.C. § 9012(f) violates the First Amendment of the Constitution of the United States.

OPINION BELOW

The September 30, 1980 opinion of the district court, which is not yet officially reported, appears as Appendix A to this Jurisdictional Statement.[1]

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[1] Citations to pages of the Appendices to this Jurisdictional Statement are given as "App. ——."

Appendix I (App. 69a) is the Amended Complaint, without Exhibits, filed in Civil Action No. 80-1609. The Exhibits could not

JURISDICTION

The proceeding below consisted of two civil actions, which were consolidated by order filed September 25, 1980 (Appendix F, App. 37a). Civil Action No. 80-1609 was brought, under 26 U.S.C. § 9011(b), by appellants against appellees Harrison Schmitt, Carl T. Curtis, Americans For Change ("AFC"), Americans For An Effective Presidency ("AEP"), and Fund For A Conservative Majority ("FCM"). Civil Action No. 80-1754 was brought, under 26 U.S.C. §§ 9011(b) and 9010(c), by the Federal Election Commission ("the Commission") against appellees AFC, AEP and FCM.

The actions were heard and decided together by a three-judge district court, pursuant to 26 U.S.C. § 9011 (b)(2). On August 28, 1980 the court entered orders granting appellees' motions for summary judgment and dismissing both actions (Appendices B and C, App. 31a, 33a). On September 30, 1980 the court issued an opinion and entered a further order disposing of the cases consistently with its earlier orders (App. 1a, 30a).[2] No rehearing was requested.

Appellants filed timely notices of appeal on September 26, 1980 (Appendices D and E, App. 35a, 36a) and a timely amended notice on October 3, 1980 (Appendix G, App. 39a). The Court has jurisdiction over this appeal under 26 U.S.C. § 9011(b)(2) and 28 U.S.C. §§ 1252 and 1253.

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practicably be reproduced in the main volume of Appendices. They have, accordingly, been lodged with the Court under separate cover. Citations to pages in that volume are given as "App. (Supp.) ——."

[2] The district court did not enter a separately designated judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides, in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ."

26 U.S.C. § 9012(f) provides, in relevant part:

> ". . . [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1000."

Appendix H sets forth (1) the Presidential Election Campaign Fund Act, of which 26 U.S.C. § 9012(f) is a part (App. 41a-66a), and (2) related provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 441a(b) and 441a(c) (App. 66a-68a).

STATEMENT OF THE CASE

A. The Statutory Scheme.

In 1971 Congress enacted the Presidential Election Campaign Fund Act, 26 U.S.C. ch. 95 ("Fund Act"), which provides for public financing, as an optional alternative to private fundraising, in Presidential general election campaigns. Public financing under the Fund Act became available for the first time in the 1976 general election. *See* 26 U.S.C. § 9013.

In order to be eligible for public financing, candidates for President and Vice President must agree that they

and their "authorized committees" [3] will abide by restrictions on contributions and on the amount of "qualified campaign expenses" they incur.[4] *See* 26 U.S.C. §§ 9002(4), 9003. In particular, the candidates of a major party must certify to the Commission that they and their authorized committees (1) will not incur aggregate qualified campaign expenses in excess of the public payment and (2) will not accept contributions to defray campaign expenses. 26 U.S.C. § 9003(b). Upon receiving public financing, major-party candidates and their authorized committees must live up to their certifications, by limiting their total campaign expenses to the amount of the public grant—$29,440,000 for the 1980 general election [5]—and not accepting contributions. 26 U.S.C. §§ 9012(a)(1), (b)(1).

26 U.S.C. § 9012(f), the section at issue in this appeal, complements those provisions by regulating political committees that are not "authorized committees" of candidates for President and Vice President—*i.e.*, political

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[3] The Fund Act defines a "political committee" as

> "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." 26 U.S.C. § 9002(9).

A political committee is an "authorized committee" of candidates for President and Vice President if it is "authorized in writing by such candidates to incur expenses to further the election of such candidates." 26 U.S.C. § 9002(1).

[4] "Qualified campaign expenses" include all campaign-related expenses incurred by the candidates, by their authorized committees or by any person authorized by the candidates or one of their authorized committees. 26 U.S.C. § 9002(11).

[5] *See* 26 U.S.C. § 9004(a); 2 U.S.C. §§ 441a(b)(1)(B), 441a(c).

committees that are not part of the candidates' official campaign organization. Section 9012(f) prohibits such political committees from spending more than $1,000 to further the election of Presidential and Vice Presidential candidates who have chosen to finance their campaign through a Fund Act grant, instead of through private fundraising. By its terms, Section 9012(f) does not limit expenditures by individuals or by groups of individuals that do not constitute "political committees" within the meaning of the Fund Act.

B. The Facts That Gave Rise To These Cases.

Ronald Reagan, the Republican Party candidate for President in the 1980 general election, opted to finance his campaign through a public financing grant under the Fund Act. Consequently, the Reagan campaign[6] was prohibited from accepting private campaign contributions and from spending more than the amount of the public grant, and political committees that were not part of the official Reagan campaign were prohibited by 26 U.S.C. § 9012(f) from spending more than $1,000 to further Mr. Reagan's election.

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[6] We use the terms "the Reagan campaign" and "the official Reagan campaign" to refer to Ronald Reagan, his authorized committees and their agents. His authorized committees included the Reagan For President Committee, the Reagan For President General Election Committee, the Reagan For President Compliance Fund and the 1980 Republican Presidential Unity Committee. (*See* Statement of Candidacy of Ronald Reagan, filed with the Federal Election Commission and dated June 26, 1980.) The Republican National Committee was also an authorized committee and agent of the Reagan campaign. (*See* Exhibit A to Affidavit of William E. Brock, III, filed July 24, 1980, on behalf of the Reagan For President General Election Committee and Ronald Reagan in *Carter-Mondale Reelection Committee* v. *Federal Election Commission*, No. 80-1842 (D.C. Cir.).)

Appellees AFC, AEP and FCM are "political committees" within the meaning of the Fund Act. App. 74a, 75a, 77a. Each of them mounted a nationwide fundraising and media campaign in support of Ronald Reagan's candidacy. Their campaigns purported to be independent of the official Reagan campaign.[7] Appellees announced that they intended to raise and spend, in the aggregate, between $26,000,000 and $48,000,000.[8] Because AFC, AEP and FCM were not "authorized committees" of Ronald Reagan, that money came within the scope of 26 U.S.C. § 9012(f).

Appellees AFC, AEP and FCM raised their money primarily through computerized mass mailings. App. 77a-79a. Solicitation materials were sent to thousands of individuals whose names appeared on mailing lists that appellees purchased, rented or otherwise obtained. *See* App. (Supp.) 4b-7b, 38b-48b. Contributors to the appellee committees sent money in response to these form letters.

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[7] As discussed at pages 7-9 *infra*, appellants had alleged, in Count II of their Amended Complaint, that appellees were not in fact independent of the official Reagan campaign. App. 81a-82a. Appellants have renewed that allegation in a still-pending administrative complaint filed with the Commission pursuant to 2 U.S.C. § 437g, and are not appealing the district court's dismissal of Count II. Thus, for purposes of this appeal, we assume *arguendo* that AFC, AEP and FCM operated independently of the official Reagan campaign.

[8] App. 71a. AFC announced that, "on behalf of Ronald Reagan," it sought to raise and spend between $20,000,000 and $30,000,000. App. (Supp.) 7b; App. 77a. AEP announced that it sought to raise and spend between $3,000,000 and $8,000,000. App. 78a. FMC announced that it sought to raise and spend between $3,000,000 and $10,000,000. App. 79a.

The contributors had no control over the committees' operations or their spending decisions.[9]

The operations of each appellee committee were run, and the expenditure decisions made, by a small nucleus of professional political managers. App. 77a, 78a, 79a; App. (Supp.) 6b, 17b-18b. Some of the organizers and operators of appellee committees had been involved in running past Republican Party presidential campaigns. App. 76a-77a. Appellees had various interlocking relationships with authorized committees of Ronald Reagan during the 1980 campaign. AFC shared personnel with the Republican National Committee, the 1980 Republican Presidential Unity Committee and the Reagan For President Committee, App. 74a-75a, and took part in the 1980 Republican National Convention. App. 78a; App. (Supp.) 11b. AEP had interlocks with the Republican National Committee and the Reagan For President Committee.

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[9] Although AFC invited contributors to send in their "thoughts and suggestions," AFC told the contributors that "[t]he decisions on expenditures must be controlled by the Committee." App. (Supp.) 6b. FCM just asked for money, and did not invite contributors to send in their views on expenditure decisions. App. (Supp.) 38b-48b. As for AEP, its initial release had sought to create the appearance that there would be contributor participation. According to that release, every contributor would automatically become a "Member" of AEP, and virtually every "Member" could automatically be deemed a "Participating Member." App. (Supp.) 16b. "Participating Members" were to be "periodically polled and invited to periodic meetings to consider policy questions before the organization." App. (Supp.) 17b. But AEP never even stated—let alone presented evidence—that there had in fact been such polls of or invitations to contributors, or that such polls or meetings (if any) in fact determined AEP policy.

The record thus contained no evidence that the contributors to the appellee committees actually exercised any control over the committees' activities. Whether they did is, of course, a question of fact. Appellants sought to inquire into this matter through discovery, but the district court denied all of appellants' discovery requests. *See* pp. 9-10 *infra*.

App. 76a. FCM shared common campaign consultants and vendors with the Reagan campaign.[10]

At least two of the appellee committees operated under names designed to foster the impression that they were part of the Reagan campaign. AFC operated under the name "Reagan For President in '80." App. 77a; App. (Supp.) 4b, 6b, 7b. FCM operated under the name "Citizens For Reagan in '80." App. 79a; App. (Supp.) 38b-48b.[11] Appellees' literature suggested that their purpose was to allow the Reagan campaign indirectly to evade the prohibitions against private fundraising and excess expenditures that apply to publicly financed candidates. Thus, appellees encouraged contributors to give to them the money that could not be given to Ronald Reagan directly, so that they could spend on his behalf more than his campaign could spend directly. App. (Supp.) 3b-4b, 42b-43b.[12]

C. The Proceedings Below.

On July 1, 1980, appellants filed a Complaint against AFC and its Chairman and Treasurer (Civil Action No. 80-1609). Count I alleged that AFC's activities, whether or not independent of the official Reagan campaign, violated 26 U.S.C. § 9012(f). Count II alleged that AFC was not in fact independent of the official Reagan campaign and that AFC's receipts and expenditures were therefore chargeable to the official Reagan campaign, resulting in violations of the Fund Act's restrictions on

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[10] *See* Plaintiffs' Opening Brief on the Merits (pp. 17-18), filed by appellants in Civil Action No. 80-1609 on August 4, 1980.

[11] Appellees' use of these names violated the spirit, if not the letter, of 2 U.S.C. § 432(e)(4), which prohibits political committees that are not authorized committees of a candidate from using the candidate's name in their titles.

[12] *See also* Plaintiffs' Opening Brief on the Merits (p. 16), filed by appellants in Civil Action No. 80-1609 on August 4, 1980.

private fundraising and excess expenditures. The Complaint sought declaratory and injunctive relief. Appellants requested that a three-judge district court be convened, and the action expedited, pursuant to 26 U.S.C. § 9011(b). Appellants sought discovery and moved for leave to commence the discovery immediately.

On July 15, 1980, the Commission filed an action against appellees AFC, AEP and FCM (Civil Action No. 80-1754). The Commission contended that appellees' activities, whether or not independent of the Reagan campaign, violated 26 U.S.C. § 9012(f). The Commission sought declaratory relief, including a declaration that Section 9012(f) is constitutional.

On July 17, 1980, appellants filed an Amended Complaint that added appellees AEP and FCM as defendants (Appendix I, App. 69a-84a). As a result, the Commission's action and Count I of appellants' Amended Complaint were essentially identical. Appellants moved to consolidate the two actions and also to intervene as plaintiffs in the Commission's action.

Appellees moved for summary judgment and dismissal in both actions. AFC argued that the prohibition in 26 U.S.C. § 9012(f) did not apply to political committees whose activities were independent of a publicly financed candidate's official campaign, and all of the appellees argued that Section 9012(f) was unconstitutional as applied to such committees. Appellees also moved to dismiss appellants' action (No. 80-1609) on jurisdictional grounds and to stay the discovery that appellants had sought. On July 21, 1980 the Commission also moved to dismiss appellants' action on jurisdiction grounds.[13]

[13] The Commission had earlier, on July 11, 1980, sought leave to intervene as a defendant in appellants' action for the limited purpose of moving to dismiss on the ground that appellants' action, as it then stood, impinged upon the Commission's primary jurisdiction over the enforcement of the Federal election laws, notwithstanding the plain language of 26 U.S.C. § 9011(b).

A three-judge district court was designated on July 16, 1980. The court stayed all discovery and set briefing and argument schedules on the jurisdictional issues and on the merits. Briefing and argument were held, and the court's opinion rendered, without any factual development having taken place.[14]

On August 28, 1980, the district court issued orders dismissing both actions. In the Commission's action, which was grounded on 26 U.S.C. § 9012(f), the court granted appellees' motions for summary judgment on the merits. App. 33a. In appellants' action the court dismissed Count I, which also was grounded on Section 9012(f), on the basis of its disposition of the Commission's case. App. 31a. The court dismissed Count II of appellants' Amended Complaint for lack of jurisdiction and failure to state a claim.[15] *Id.*

On September 25, 1980, the Court issued an order formally consolidating the two cases. App. 37a. On September 30, 1980, the Court issued its opinion (Appendix A, App. 1a).

D. The District Court's Opinion.

At the outset the district court rejected AFC's statutory argument that 26 U.S.C. § 9012(f) does not reach expenditures by political committees that operate inde-

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[14] Thus, the record before the district court consisted essentially of (1) the allegations in, and the exhibits to, appellants' Amended Complaint, (2) the allegations in the Commission's Complaint, (3) additional factual allegations (together with supporting citations) set forth in appellants' Opening Brief on the Merits, filed August 4, 1980, and (4) the documentation submitted by the Commission on August 4, 1980 in support of its motion for summary judgment. In addition, AFC submitted a conclusory affidavit of its Chairman, Harrison Schmitt, on August 4, 1980, but the district court denied appellants' request for discovery into the assertions made in the affidavit.

[15] Appellants are not appealing from the district court's dismissal of Count II. *See* note 7 *supra*.

pendently of a publicly financed candidate's official campaign organization. App. 5a-7a. The district court then proceeded to consider whether Section 9012(f), as applied to such political committees, was constitutional.

The district court's analysis rested upon its reading of this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), App. 8a-14a, and in particular upon its interpretation of the distinction between contributions and expenditures, App. 11a-14a. Applying its interpretation to what it assumed to be the facts of the case, the district court concluded that this "is an 'expenditure' case because it is precisely the speech of individual contributors which is hampered by the statutory restriction." App. 15a.

The district court's application of the contribution-expenditure distinction was premised upon several factual findings. The court stated that "speech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or her constituent supporters (or, contributors to the non-publicly funded candidate)." App. 17a. In this connection, the district court also found that "[t]he organizers of independent political committees, as agents and unlike candidates, are tied by their commitments to their particular contributors," App. 18a, and that "[t]he contributors do have power over the speech disseminated by the political committees." App. 16a.

The district court concluded that 26 U.S.C. § 9012(f) does not serve a sufficiently compelling governmental interest to outweigh the burden that (in the court's view) it imposes on speech. App. 19a-21a. According to the court, the fact that a political committee operates independently of a candidate's official campaign organization suffices to eliminate any danger that the candidate, if elected, will be beholden to the committee. App. 19a. Beyond that, the court perceived no danger that individual contributors could, through their contributions to a politi-

cal committee, compromise the candidate. App. 19a-20a. The court thus concluded that Section 9012(f) does not serve a compelling governmental interest.

In weighing the burden on speech, the district court accorded no constitutional significance to the fact that Section 9012(f), while regulating political committees, leaves individuals and groups of individuals free to spend as much of their own money as they wish to express their views. App. 21a-22a. The court found political committees that spend other people's money to be constitutionally indistinguishable from individuals who spend their own money for their own speech. App. 22a. In addition, the court concluded that Section 9012(f) violates the associational rights of contributors to a political committee. App. 22a-24a.

On the basis of its analysis, the district court held 26 U.S.C. § 9012(f) unconstitutional under the First Amendment. The district court granted summary judgment for appellees AFC, AEP and FCM in the Commission's action (No. 80-1754). App. 30a. Stating that Count I of appellants' action (No. 80-1609) "involves the same issue as in the action brought by the FEC, herein resolved against the FEC," the district court dismissed Count I of appellants' action "as mooted pursuant to our decision in the FEC action." App. 25a. *See also* App. 30a.

ARGUMENT

The district court, acting on the bare pleadings and without allowing any factual development, struck down an Act of Congress as unconstitutional. The district court erred in doing so. Constitutional adjudication cannot be undertaken in a vacuum, on the basis of unsupported assumptions; it requires a record that fairly illuminates the activities and subjects at issue. Accordingly, the most appropriate course for this Court is summarily to reverse the district court's decision and remand the case for the development of an adequate factual record. If this Court declines to do so, it should certainly insist upon full briefing and argument before deciding this difficult and important case.

I. THE COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW AND REMAND THE CASE FOR FACTUAL DEVELOPMENT.

This case, as it presently stands, is ill suited to constitutional adjudication. There is virtually no factual record beyond the pleadings, because appellees opposed, and the district court disallowed, all discovery. The factual findings that formed the major premises of the district court's decision were thus made in a vacuum and, not surprisingly, were totally unsupported.

The district court should not have ruled on the constitutionality of 26 U.S.C. § 9012(f) in the absence of "the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *United States* v. *Automobile Workers*, 352 U.S. 567, 591 (1957). *See also Askew* v. *Hargrave*, 401 U.S. 476, 478-79 (1971) (per curiam); *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 113 (1962) (per curiam) (referring to the need for an "adequate and full-bodied record"). The necessary factual inquiries

were relatively limited, and an ample record could have been—and still can be—developed quickly and efficiently.[16] In both *Buckley* v. *Valeo*, *supra*, and *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge district court), *aff'd*, 445 U.S. 955 (1980), the constitutionality of Fund Act provisions was adjudicated on the basis of detailed factual findings supported by evidentiary records that fairly illuminated the activities and subjects involved. *See* 424 U.S. at 9-10; 487 F. Supp. at 290-307. By not compiling such a record in this case before ruling on the constitutionality of Section 9012(f), the district court fell into the error of deciding an important constitutional issue in the abstract—an error that this Court can and should avoid.[17]

The district court's decision demonstrates exactly why constitutional issues should not be decided in a vacuum.

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[16] Much of the discovery originally sought by appellants related only to the issue, raised in Count II of the Amended Complaint, whether the appellee committees were in fact independent of the official Reagan campaign. That issue, however, is not on appeal here, *see* note 7 *supra*, and would therefore not be before the district court in the event of a remand.

Appellants also sought discovery bearing upon the issue, involved in Count I, whether 26 U.S.C. § 9012(f) is constitutional. That discovery, though relatively limited in scope, was of critical importance. It would have illuminated the relationship between contributors to the appellee committees and the handful of political operators who actually controlled the committees. *See* note 9 *supra*. It would also have provided a factual basis for determining whether the activities of political committees such as appellees pose the kinds of dangers of actual or apparent *quid pro quo*'s that this Court recognized in *Buckley*. *See* 424 U.S. at 26-27.

[17] In the absence of an evidentiary record, the district court should have resolved all factual uncertainties in favor of appellants, since appellants' case was before the court on motions by appellees to dismiss and for summary judgment. The district court's failure to do so was clear error. *See, e.g., Conley* v. *Gibson*, 355 U.S. 41 (1957); *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962) (per curiam).

One of the court's principal errors was to base its analysis upon factual findings that lacked any support in the record—findings concerning, among other things, the relationship between appellee committees and their contributors, and the potential for corruption (or the appearance of corruption) posed by the committees' activities. *See* pp. 11-12 *infra*. The record simply does not contain the facts needed to illuminate these points, which are critical to a proper resolution of the constitutional issues.

For these reasons, the best course by far is for this Court to reverse the decision below and remand the case for factual development. This is what the Court has previously done when, in the exercise of its appellate jurisdiction, it was faced with a record inadequate for constitutional adjudication. *United States* v. *Automobile Workers*, *supra*.[18] Such a remand will, of course, delay the ultimate decision by this Court. But there is no need for haste, now that the election is past. So long as the validity of 26 U.S.C. § 9012(f) is decided by this Court before the next Presidential general election campaign, the decision will be timely. The Court can and should

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[18] The *Automobile Workers* case is solid precedent for a reversal and remand in this case. *Automobile Workers* was a direct appeal from the district court. The appeal involved the constitutionality of former 18 U.S.C. § 610, which prohibited (among other things) expenditures by labor unions to further the election of candidates for federal office. The case had arisen from the district court's dismissal of an indictment, and as a result there was no factual record beyond the pleadings. This Court was confronted with a challenge to the facial constitutionality of the statute, and both parties were apparently pressing for a decision on the issue. *See* 352 U.S. at 591-92. Nevertheless, this Court reversed and remanded the case to the district court in order to provide "the concrete factual setting . . . especially demanded for constitutional decision." *Id.* at 591.

The procedure followed in *Automobile Workers* is well established. *See, e.g., Polk Co.* v. *Glover*, 305 U.S. 5, 10 (1938) (per curiam) (reversing and remanding to three-judge district court for factual development); *Borden's Co.* v. *Baldwin*, 293 U.S. 194, 208-13 (1934) (same).

proceed deliberately to ensure that this case is decided on the basis of an adequate record.

II. IN ANY EVENT, THE COURT SHOULD NOT DECIDE THIS DIFFICULT AND IMPORTANT CASE WITHOUT FULL BRIEFING AND ARGUMENT.

If the Court does not reverse the decision below and remand for the development of a factual record, then the Court should definitely give this case plenary consideration. The statute that the district court invalidated is too important, and the constitutional issues involved are too substantial, to allow the merits to be decided without full briefing and argument.

A. The Provision That The Court Below Invalidated Is An Important Part Of The Statutory Scheme For The Public Financing Of Presidential General Elections.

The purpose served by the Fund Act is important in the extreme, because it directly affects the integrity of, and the perception of integrity surrounding, the office of President of the United States. *See Burroughs* v. *United States*, 290 U.S. 534, 545 (1934). The financing of Presidential campaigns through private fundraising creates a danger of "political *quid pro quo*[s]" that can compromise candidates, as well as a danger that candidates will appear to have been compromised. *Buckley* v. *Valeo*, 424 U.S. at 26-27. Congress enacted the Fund Act to eliminate those dangers.

The Fund Act enables Presidential candidates to finance their campaigns in a manner that does not create "implicit obligations" to private benefactors. *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280, 284 (S.D.N.Y.) (three-judge district court), *aff'd*, 445 U.S. 955 (1980). Public financing eliminates such obligations by providing generous federal funding at the outset of a Presidential campaign, thus encouraging Presidential candidates to forswear private fundraising:

> "If the candidate chooses to accept public financing he or she is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that might have existed as a result of a privately financed campaign." *Id.*

Congress' objective of eliminating the dangers inherent in private fundraising was best expressed by Senator Pastore, the Fund Act's sponsor, when he declared: "Let's be done with it. Let the president be a free and independent man. Let him not be beholden to anyone." 119 Cong. Rec. 38900 (1973).

26 U.S.C. § 9012(f) is highly important to the attainment of Congress' objective. A candidate can easily become beholden (or appear to be beholden) to influential political operators who control and spend large sums of money, amassed from private contributions, in support of the candidate. It is therefore essential to the integrity of the Fund Act's public financing scheme that such activities be limited. Congress did just that in Section 9012(f), which makes it unlawful for any "political committee which is not an authorized committee" to "incur expenditures [in excess of $1,000] to further the election of" a Presidential candidate who has accepted public financing.

It was also essential to the integrity of the public financing scheme that Section 9012(f) apply to "independent" political committees, as well as to political committees that are affiliated or coordinated with a publicly financed candidate's campaign. Neither overt coordination nor clandestine consultation is necessary to render a Presidential candidate beholden to his benefactors, or to create the appearance that he is beholden to them; the candidate's benefactors know how to help him, and the candidate knows full well who is helping him and how much help he is getting. Thus, expenditures by independent political committees—particularly those run by party professionals who raise and command multi-million-dollar war chests—pose every bit

as much potential for creating "implicit obligations" as do coordinated expenditures.

Section 9012(f) would, moreover, be unworkable and ineffective if it reached only political committees that are affiliated or coordinated with the candidate's official campaign. The Congress that enacted the Fund Act in 1971 knew first-hand that "independent" political committees were often used as vehicles for evading the existing Federal limits on campaign contributions and expenditures.[19] The ease with which such evasion could be carried out required that independent political committees also be encompassed within Section 9012(f).[20] Congress' action was thus fully in accord with this Court's admonition not to "naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence. . . ." *Buckley* v. *Valeo*, 424 U.S. at 45.

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[19] *See* Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 365 (1977):

> "These federal ceilings on both contributions and expenditures were widely circumvented through the proliferation of committees. Committees openly supporting candidates called themselves independent, claiming to operate without the knowledge or consent of the candidates . . . . Often they were vest pocket committees."

See also H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 5 (1976) (". . . [P]rior to 1971 the laws regulating Federal campaigns permitted an infinite proliferation of political committees which were ostensibly separate entities but which were in fact a means for advancing a candidate's campaign.").

[20] It would be exceedingly difficult to enforce effectively a prohibition reaching only political committees that are coordinated with the candidate's official campaign organization. Such coordination is very difficult and time-consuming to prove, particularly when (as will usually be the case) the committee has tried to mask it. The few months that elapse from the start to the end of the general election campaign would in most cases not provide enough time to develop proof of coordination, even under procedures far more accelerated than those the Commission is required to follow. *See* 2 U.S.C. § 437g.

Public financing simply cannot work if a handful of political professionals are free to solicit millions of dollars from contributors and pump them into a parallel (but "unofficial") campaign on behalf of a candidate despite his agreement to give up private financing as a condition of receiving the public grant. The Fund Act would, therefore, be seriously undermined if the district court's invalidation of Section 9012(f) were allowed to stand.

Because "public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest," *Buckley*, 424 U.S. at 96, the issues involved in this case are important. Indeed, they are "not less than basic to a democratic society," since "what is involved here is the integrity of our electoral process . . ." *United States* v. *Automobile Workers*, 352 U.S. at 570. For that reason alone, this case warrants plenary consideration.

B. This Case Poses Substantial Constitutional Issues Concerning The Application of *Buckley* v. *Valeo*.

1. *This Case Involves Constitutional Questions Not Previously Considered by this Court.*

This Court has recognized that the Fund Act serves important governmental interests and has twice upheld it against constitutional attack. In *Buckley* v. *Valeo*, the Court stated that the Fund Act "furthers, not abridges, pertinent First Amendment values." 424 U.S. at 93 (footnote omitted). The Court there upheld the Fund Act against challenges that its enactment exceeded Congress' authority under the General Welfare Clause and that it unlawfully discriminated against the candidates of non-major parties. *Id.* at 85-109. And later, in *Republican National Committee* v. *Federal Election Commission*, *supra*, this Court rejected First Amendment and other challenges to the Fund Act's prohibitions against contributions to and excess expenditures by publicly financed candidates.

In those cases, this Court did not have occasion to consider either 26 U.S.C. § 9012(f) or "independent" campaign activities of the kind that appellees have carried on. The Fund Act's public financing scheme had never been used when, in January 1976, this Court decided *Buckley*. Public financing was first used later that year, in the 1976 general election, when both major-party candidates opted to receive public financing. Both major-party candidates also chose to receive public financing for the 1980 election. Only in 1980, however, did there emerge "independent" political committees, such as appellees, running nationwide fundraising and media campaigns in support of publicly funded candidates. Such activities and the dangers they pose were not before this Court for consideration in *Buckley*.

Nor were such matters before the Court in the *Republican National Committee* case. Although some of the briefs (including that of appellant Common Cause) discussed the right of individuals to use as much of their own money as they wish for independent expenditures,[21] none of the briefs (and none of the opinions) anticipated the creation of "independent" political committees, run by party professionals, that mount parallel national campaigns using millions of dollars amassed through private contributions. Like *Buckley*, the *Republican National Committee* case was decided before activities such as those of appellees emerged on the election landscape. As a result, those activities were not addressed by this Court.

By basing its discussion of independent expenditures on election practices as they "presently appear[ed]," 424

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[21] *See, e.g.*, Brief of *Amici Curiae* Common Cause, David Cohen and Nan Waterman in Support of Appellees' Motions To Affirm (U.S., Nos. 79-1373, 79-1374, 79-1375, filed March 24, 1980), at 10 ("Individuals may spend without limit to support their chosen candidate in ways that are not coordinated with the candidate's campaign." (footnote omitted)).

U.S. at 46, this Court in *Buckley* recognized that new patterns of conduct might require consideration in future cases. This is such a case. It involves multi-million-dollar fundraising schemes not previously considered by this Court, as well as the constitutionality of an important statutory provision that this Court has never before discussed. Under these circumstances, the Court should insist upon full briefing and argument.

2. *The District Court's Constitutional Analysis Was Erroneous.*

The district court committed fundamental errors of constitutional analysis, which were caused in large measure by its adoption of unsupported and incorrect factual premises. These deficiencies in the district court's decision make it especially important that this Court give the case plenary consideration.

a. The district court erroneously applied the constitutional distinction between contributions and expenditures.

In *Buckley* this Court drew a constitutional distinction between contributions and expenditures. 424 U.S. at 20-21. "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 21. For that reason, contributions involve only "marginal" First Amendment interests. *Id.* at 20. The marginal First Amendment significance of contributions is not affected by the fact that their recipients may spend them for speech:

> "While contributions may result in political expression if spent by a candidate *or an association* to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21 (emphasis added).

The district court misapplied the distinction between contributions and expenditures. The core feature of appellees' operations is the mass solicitation and aggregation of *contributions*. The district court's analysis, however, was bottomed on the assertion that this case "is an 'expenditure' case because it is precisely the speech of individual contributors which is hampered by the statutory restriction." App. 15a. That assertion demolishes the contribution-expenditure distinction drawn by this Court. The whole point of the distinction is that making individual contributions is *not* tantamount to expressing "the underlying basis for the support," even if the money contributed is later transformed "into political debate . . . by someone other than the contributor." 424 U.S. at 21.

There is no valid basis in constitutional doctrine for the district court's assertion that contributions to a political committee are equivalent to the discussion of candidates and issues by the contributors. *See Buckley*, 424 U.S. at 21. The district court premised its assertion on its factual finding that "speech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or her constituent supporters (or, contributors to the non-publicly funded candidate)." App. 17a. But this attempt to draw a line between contributions to candidates and contributions to political committees is both unsupported in the record and constitutionally erroneous. As this Court noted in *Buckley*, contributions retain their "marginal" First Amendment nature even when they are later transformed into political debate "by a candidate *or an association*." 424 U.S. at 21 (emphasis added).

The district court relied upon a number of other factual assertions to justify its departures from this Court's analysis in *Buckley*. Those assertions, however, lacked any foundation in the record.

First, there is no basis for the district court's statement that 26 U.S.C. § 9012(f) hampers "the speech of individual contributors." App. 15a. The record does not support the proposition that individual contributors, by sending checks to appellees in response to mass-mailed solicitation letters, were doing anything more than engaging in "the undifferentiated, symbolic act of contributing." *Buckley*, 421 U.S. at 21. Section 9012(f) clearly "does not in any way infringe the contributor's freedom to discuss candidates and issues," *id.*, for it allows each contributor to spend as much of his own money as he wishes for his own political speech. *See* note 23 *infra*.

There is also no basis in the record for the district court's characterization of the relationship between political committees and their contributors, a characterization that is fundamental to the court's analysis. The court stated that "[t]he organizers of independent political committees, as agents and unlike candidates, are tied by their commitments to their particular contributors," App. 18a, and that "[t]he contributors do have power over the speech disseminated by the political committees." App. 16a. But so far as the record showed, contributors to the appellee committees did not have any effective control over the committees' expenditure decisions. The decisions were made by the political professionals who organized the committees, solicited contributions through mass mailings and ran the committees' operations. The district court thus based its constitutional analysis on a model of a "political committee"—involving a true consensual relationship between the committee and its contributors, and in which the contributors exercise effective control over the committee's operations—that bore no relationship to the situation before the court.[22]

[22] The model upon which the district court's analysis rested is, in fact, not even a "political committee" within the meaning of the Fund Act. It is, rather, a group of persons who pool and spend

b. The district court erroneously concluded that 26 U.S.C. § 9012(f) imposes a significant burden on expression and association.

Section 9012(f) leaves every individual free to further the election of a publicly financed candidate by spending as much of his own money as he wishes. It also leaves groups of individuals free to pool their own money and to spend it themselves, again without limit.[23]

Because Section 9012(f) places no restrictions on such expenditures, it does not reduce the total amount of money that can be spent for expression in support of a candidate.[24] It merely requires, at bottom, that speakers spend their own money rather than someone else's. Section 9012(f), in its effect, thus tracks exactly the constitutional distinction between contributions and expenditures drawn by this Court in *Buckley*:[25] It channels the

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their own money, without giving up control over it. The distinguishing feature of a Fund Act "political committee" is that the money it spends is mailed in by contributors who do not have control over the expenditures; a "political committee" thus spends other people's money.

[23] The legislative history of the Fund Act makes it clear that 26 U.S.C. § 9012(f) does not limit independent expenditures by individuals. H.R. Rep. No. 92-708, 92d Cong., 1st Sess. 58 (1971). The legislative history also makes it clear that Congress did not intend Section 9012(f) to apply to all organizations or groups. 117 Cong. Rec. 42398 (1971).

[24] Thus, 26 U.S.C. § 9012(f) differs drastically from the provisions invalidated in *Buckley*. *See* 424 U.S. at 39 ("It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates.").

[25] This Court is of course required, if possible, to construe a challenged statute in a way that saves it from constitutional infirmity. *E.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974); *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 571 (1973). No special narrowing construction is necessary here, however, since the construction of Section 9012(f) dictated by the text and the legislative history coincides exactly with the constitutional requirements of *Buckley*.

money of individuals into personal political expression rather than into uses (*i.e.*, contributions) that involve only "marginal" First Amendment interests. *See* 424 U.S. at 20. Section 9012(f) thus fosters First Amendment goals, because it promotes direct individual involvement in the election process, and thereby helps to "sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States* v. *Automobile Workers*, 352 U.S. at 575.

The district court therefore committed a serious error in according no constitutional significance to the fact that Section 9012(f) leaves individuals free to spend as much of their money as they wish in support of a candidate. App. 21a-22a. As this Court made clear in *Buckley*, the absence of restrictions on a person's right to express his views, as an individual, on political issues and candidates *is* constitutionally significant. *See* 424 U.S. at 27 n.29 and 48 n.54 (discussing *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548 (1973)). The court below disregarded this important point, because it mistakenly viewed the holding in *Buckley* as invalidating even independent expenditure restrictions that, like Section 9012(f), apply only to "political committees" and not to individuals or groups of individuals. App. 21a. But the statute invalidated in *Buckley* had restricted independent expenditures by all individuals and all groups *as well as* by political committees.[26] *See*

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[26] Thus, while *Buckley* held that Congress may not constitutionally enact a sweeping statute restricting all independent expenditures, it left open the question whether Congress may enact a much narrower provision that—like Section 9012(f)—regulates only independent expenditures by "political committees."

The district court erred in suggesting that this Court, in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), gave a negative answer to the question left open in *Buckley*. App. 21a & n.42. In fact, the *Bellotti* opinion points clearly toward an affirma-

424 U.S. at 39-40 (discussing former 18 U.S.C. § 608 (e)(1)). That statute had, therefore, imposed burdens on political expression that were vastly greater than whatever minimal burdens may be imposed by Section 9012(f).

The district court also erred in concluding that Section 9012(f) significantly impairs associational freedoms. App. 22a-24a. Section 9012(f) does not restrict any person's ability to associate himself with any candidate, political party, committee, group, or other entity. All it regulates is the use by political committees of money contributed in response to mass solicitation appeals. The only associational interests affected by Section 9012(f) are, therefore, the "marginal" interests inherent in making contributions, 424 U.S. at 20, and, under *Buckley*, limitations on those interests are constitutionally permissible. Section 9012(f) has a much smaller impact on association than did "the Hatch Act's broad restrictions on the associational freedoms of federal employees" that this Court, emphasizing the absence of any limitation on individual expression, previously upheld. *Buckley*, 424 U.S. at 48 n.54 (discussing *Civil Service Commission* v. *Letter Carriers*, *supra*).

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tive answer, one that supports the constitutionality of Section 9012(f):

> "The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. . . . The importance of the governmental interest in preventing this occurrence has never been doubted. . . . *Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures* by corporations to influence candidate elections. *Cf. Buckley* v. *Valeo*, *supra*, at 46 . . . ."

435 U.S. at 788 n.26 (emphasis added).

c. The district court erroneously concluded that 26 U.S.C. § 9012(f) does not serve important governmental interests.

The district court erred in concluding that Section 9012(f) does not serve important governmental interests. App. 19a-21a. Congress correctly saw a grave risk that a Presidential candidate who opts for public financing—and whose campaign expenditures may therefore not exceed the amount of the public financing grant—will be beholden (or appear to be beholden) to persons who raise and spend an additional $3 million, $5 million or $20 million on his behalf. The risk is just as grave as that created by contributions in those amounts. *See* pages 16-19 *supra*.

In the district court's view, the mere fact (if, indeed, it is a fact) that a political committee operates independently of the candidate's official campaign eliminates any danger that the candidate, once elected, will be beholden to his benefactors. App. 19a. The court's view, which was not supported by anything in the record, rested on a mistaken understanding of what this Court said in *Buckley*. According to the district court, this Court felt that independent expenditures "*could not* pose the same *quid pro quo* problem" as contributions. App. 19a (emphasis added). What this Court in fact said was that "the independent advocacy restricted by the provision *does not presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 424 U.S. at 46 (emphasis added). This Court thus recognized the possibility that such dangers might arise in the future.[27] This Court's observation was made before the Fund Act had ever been used, and long before anyone had attempted to use nationwide, professionally-

[27] This Court reiterated that recognition in *First National Bank of Boston* v. *Bellotti*, citing to the pertinent page in *Buckley*. *See* note 26 *supra*.

run unofficial campaign organizations as vehicles for circumventing the Act's prohibition against contributions to and excess expenditures by publicly financed candidates. The dangers that were not "presently" apparent then are patently obvious now.

In reaching its conclusion that political committees such as appellees pose no danger of creating improper political debts (or the appearance of such debts), the district court examined the wrong end of the process. Instead of focusing on the obvious influence wielded by the key operators who run the political committees and control their aggregated funds, the court focused on the lack of influence of the many essentially anonymous contributors.[28] Thus the court stated: "It is difficult, then, to imagine how the thousands of 'small voices' associated together in a political committee could compromise a candidate for President." App. 19a-20a. The danger, of course, does not result from any chorus of "small voices." It results, rather, from the big sticks—the multi-million-dollar campaign funds—that are wielded for the candidate's benefit by a handful of political pros.

Because of its incorrect focus, the district court failed to consider whether political committees such as appellees might, by concentrating massive funds in the hands of a few political operators, pose a danger of political debts, or the appearance of such debts, far beyond that posed by individuals. As a result of its oversight, the district court simply missed the basic, and compelling, justification for the enactment of 26 U.S.C. § 9012(f).

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[28] The source of the district court's incorrect focus was its reliance on an erroneous and unsupported model of political committees—a model that, as discussed above, pictured the contributors as actually controlling the committees. But the case before the court involved political committees in which the contributors were strangers to the committees' operations and—so far as the record showed—did nothing more than contribute money to funds controlled by the committees' managers. *See* notes 9 and 22 *supra*.

CONCLUSION

For the foregoing reasons, the Court should summarily reverse the decision below and remand the case to the district court with directions to develop a factual record. In the alternative, the Court should note probable jurisdiction of this appeal and set it down for plenary briefing and argument.

Respectfully submitted,

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